Supreme Court, U.S.
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No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MED EXPRESS

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QUESTIONS PRESENTED

1. Whether an implied private right of action exists to enforce federal drug testing regulations enacted pursuant to the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992) and its progeny.

2. Whether Petitioner's claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics* was properly before the district court.

3. Whether the limited constitutional tort recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics* provides Petitioner an implied remedy for alleged procedural violations of federal urine collection and testing regulations.

PARTIES TO THE PROCEEDINGS

Petitioner is Christopher J. Parry. Respondents are LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express; Mohawk Motors of Michigan, Inc.; Austintown Ambulatory Emergency Room, Inc.; and Drug Free, Inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express, is a wholly owned subsidiary of Laboratory Corporation of America Holdings, which is a publicly traded company.

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Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express ("Med Express"), respectfully submits its response to Christopher J. Parry's ("Petitioner") petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner was an interstate truck driver. On August 6, 1997, Petitioner was selected for a random drug test as required by Federal Highway Administration ("FHWA") regulations. Petitioner proceeded to Respondent Austintown Ambulatory Emergency Room, Inc. ("Austintown ER") to submit a urine specimen. Prior to receiving Petitioner's urine specimen, the collection site attendant marked Petitioner's chain of custody form to indicate the temperature of Petitioner's urine specimen was "in range." When the collection site attendant picked up Petitioner's urine specimen, however, she noticed that the urine specimen was hot to the touch. The collection site attendant took Petitioner's temperature and measured the temperature of his urine specimen. Petitioner's temperature was 98.2 degrees Fahrenheit. The temperature of Petitioner's urine specimen was 104.6 degrees Fahrenheit.

After measuring the temperature of Petitioner's urine specimen, the collection site attendant corrected all but one of the copies of the chain of custody form to indicate the specimen was not within the proper temperature range. The correction does not appear on the Petitioner's copy of the multi-part federal drug testing chain of custody form because Petitioner had been given his copy prior to the time the collection site attendant documented the precise temperature of Petitioner's urine specimen. As required by federal

regulation, the collection site attendant sealed and shipped Petitioner's urine specimen to Med Express for testing even though the temperature of the urine specimen did not match Petitioner's body temperature. The collection site attendant then informed Petitioner that he would be required to submit a second, observed urine specimen. Petitioner left the facility before submitting a second urine specimen. Petitioner was disqualified as a FHWA interstate truck driver for interfering with the testing process.

On January 27, 1998, Petitioner filed this lawsuit in the United States District Court for the Northern District of Ohio. On March 25, 1999, the district court granted summary judgment to all movant-respondents and stayed the proceedings as to two bankrupt-defendants (these defendants are not party to these proceedings). Thereafter, on June 8, 1999, Petitioner filed a Motion for Leave to File a Second Amended Complaint. The district court denied Petitioner's motion on June 18, 1999. On July 15, 1999, Petitioner filed his motion to certify the interlocutory grant of summary judgment for appeal to the Sixth Circuit Court of Appeals. In an opinion dated December 29, 2000, the Sixth Circuit affirmed the district court's summary judgment on each of Petitioner's claims against Respondents and affirmed the district court's denial of Petitioner's motion for leave to amend.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT ISSUES APPROPRIATE FOR REVIEW BY THIS COURT.

A. There is a complete absence of controversy among the circuit courts of appeals regarding the existence of an implied private right of action to enforce federal drug testing regulations.

Petitioner asks the Court to review the Sixth Circuit's holding that no implied private right of action exists to enforce FHWA regulations enacted pursuant to the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"). *See* Petition for Writ of Certiorari ("Pet."), p. 9. Each United States court of appeals that has decided whether an implied private right of action exists to enforce federal drug testing regulations, however, has held that there is no implied private right of action to enforce FOTETA. *See* Pet., App. B-19; *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 170-71 (2d Cir. 1998) (flight attendant had no private right of action to enforce FAA drug-testing regulations); *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) (no private right of action to enforce 49 C.F.R. § 40.35); *Abate v. Southern Pac. Transp. Co.*, 928 F.2d 167, 168 (5th Cir. 1991) (Federal Railroad Safety Act provides no private cause of action to enforce regulations implementing federally mandated drug-testing programs set out in 49 C.F.R. part 40). There is no conflict between the Sixth Circuit's decision and a decision of this Court, or that of any other United States court of appeals. Therefore, the Petition does not raise any issue of public or national interest such that the Court should review this case.

B. Petitioner's putative Fourth Amendment claim was not before the district court.

Petitioner also urges that the Sixth Circuit erred when it held that Petitioner's First Amended Complaint did not contain fair notice of Petitioner's putative *Bivens*[1] claim and that Respondents would have been unduly prejudiced by the addition of such a claim. *See* Pet., p. 22. Petitioner contends that he should have been granted leave to file a Second Amended Complaint alleging violations of Petitioner's constitutional rights secured to him by the Fourth Amendment under the limited constitutional tort recognized by the Court in *Bivens*. Leave to amend need only be granted in the absence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the other party by virtue of allowance of the amendment, or futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

On June 30, 1998, after conducting extensive discovery, Petitioner filed his Motion for Leave to File his First Amended Complaint. On July 6, 1998, the district court granted Petitioner leave to file his First Amended Complaint. The district court suspended discovery in this matter on August 4, 1998. As of September 16, 1998, the date on which Petitioner filed his First Amended Complaint, each Respondent had filed its dispositive motion on each of Petitioner's claims in this lawsuit. Despite Respondents' pending dispositive motions and the cessation of discovery, Petitioner did not plead a *Bivens* cause of action in his First

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1. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Amended Complaint. On September 28, 1998, Petitioner filed a combined response to Respondents' pending motions for summary judgment. Petitioner did not request leave to add his putative *Bivens* claim until June 8, 1999, over ten months after the suspension of discovery and more than two months after the district court had granted Respondents' dispositive motions.

Petitioner relies upon Count IX of his First Amended Complaint to argue that Respondents had "fair notice" of Petitioner's putative *Bivens* cause of action. *See* Pet., p. 22. Count IX, however, merely alleges that Respondents violated FHWA and Department of Transportation ("DOT") drug testing regulations and makes no reference to any alleged violation of Petitioner's Fourth Amendment rights or a *Bivens* cause of action. Furthermore, Petitioner's First Amended Complaint does not allege that Respondents were federal actors engaged in federal action. Petitioner's First Amended Complaint did not provide Respondents with notice of a *Bivens* cause of action, and was untimely and prejudicial. The district court's denial of Petitioner's Motion for Leave to File a Second Amended Complaint, and the Sixth Circuit's decision affirming that ruling, do not provide any reason for review by the Court.

C. Petitioner's contentions require a review of factual findings adverse to Petitioner by both the district court and the Sixth Circuit.

Petitioner contends that his proposed Second Amended Complaint stating a *Bivens* claim would not have been futile because the drug test made the basis of this lawsuit was inherently unreasonable due to "various procedural problems." *See* Pet., p. 23. Petitioner's claims of perceived

procedural errors in the collection of his random urine specimen, however, require a review of factual determinations by the courts below that were ***adverse*** to Petitioner. In claiming that the random drug test made the basis of this lawsuit was inherently unreasonable, Petitioner cites to a litany of alleged deficiencies including a "time delay in taking temperature, altering chain of custody forms, leaving specimen unattended, ear thermometer placed in urine specimen for temperature measurement, specific gravity being measured in [collection site attendant's] hand. . . ." *See* Pet., p. 23.

Petitioner, however, completely ignores the record in both courts that establish that the collection site attendant measured the temperature of Petitioner's random urine specimen as being 104.6° F. *See* Pet., App. B-5; Pet., App. E-7. Petitioner also ignores the lower courts' findings that he was required to submit a second urine specimen because the temperature of Petitioner's random urine specimen was outside the range considered normal under DOT drug testing regulations, and was more than six degrees hotter than his own body temperature at the time he submitted the random urine specimen.

Petitioner was disqualified for failing to provide a second urine specimen. The temperature of Petitioner's random urine specimen is dispositive regarding a determination of the appropriateness of requiring Petitioner submit a second urine specimen. Petitioner asks this Court to review the facts in the record below and overturn findings of both the district court and the Sixth Circuit that are adverse to Petitioner. Petitioner's request fails to provide a reason for review by the Court.

II. THERE IS NO IMPLIED PRIVATE RIGHT OF ACTION UNDER FOTETA.[2]

Petitioner brought this action claiming Respondents violated FHWA drug testing regulations in the collection and testing of his August 6, 1997 random drug test. In 1991, Congress passed FOTETA, which amended the Federal Aviation Act, the Federal Railroad Safety Act, and the Commercial Motor Vehicle Safety Act to require drug testing for transportation workers in safety-sensitive positions. *See* Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992) (codified in relevant part at 49 U.S.C. § 31306 (1996)). FOTETA directed the Secretary of Transportation to promulgate mandatory drug testing programs for commercial motor vehicle operators such as Petitioner. *See* 49 U.S.C. § 31306 (1996). FOTETA further directed the Secretary of Transportation to incorporate the Department of Health and Human Services ("DHHS") scientific and technical drug testing guidelines dated April 11, 1988, and any amendments to those guidelines, into the DOT's drug testing programs.[3] *See* 49 U.S.C. § 31306(c).

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2. On the facts of this case as alleged by Petitioner, and in the absence of any conflict of law in the U.S. courts of appeals, on its face, the Petition does not articulate any reason for review by the Court. In an abundance of caution, however, Med Express will address the lack of any substantive basis for Petitioner's request for review by the Court.

3. The DHHS procedures and requirements for drug testing and specimen collection are codified at 49 C.F.R. part 40. Each of the DOT operating administrations utilizes these specimen collection and testing regulations. *See* 14 C.F.R. § 121.457 & 14 C.F.R. App. I (Federal Aviation Administration); 49 C.F.R. § 653.61 (Federal Transit Administration); 49 C.F.R. § 219.703 (Federal Railroad Administration); 49 C.F.R. § 382.105 (Federal Highway Administration).

A. The text and structure of FOTETA demonstrate that Congress did not intend to create an implied private right of action to enforce federal drug testing regulations.

Petitioner contends that FOTETA provides him an implied private right of action to enforce DOT drug testing regulations. *See* Pet., p. 9. A private right of action to enforce federal law must be created by Congress. *See Alexander v. Sandoval*, __ U.S. __, 121 S. Ct. 1511, 1519 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). In determining the existence of an implied private right of action, Courts must interpret the provisions of the relevant statute to determine whether the statute displays an intent by Congress to create not just a private right, but also a private remedy.[4] *See Alexander*, 121 S. Ct. at 1519; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). The focal point in determining the existence of a private cause of action is whether Congress, expressly or by implication, intended to create a private cause of action. *See Transamerica*, 444 U.S. at 15-16; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979); *see also Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("[W]e effectively overruled the *Cort v. Ash* analysis in *Touche Ross* [and *Transamerica*], converting one of its four factors (congressional intent) into the determinative factor.").[5]

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4. Statutory intent on this latter point is determinative. *See Alexander*, 121 S. Ct. at 1519.

5. To the extent Petitioner relies upon the three other factors enunciated by this Court in *Cort v. Ash*, those factors remain relevant (Cont'd)

Congress's intent can be determined from the text and structure of a statute. *See Alexander*, 121 S. Ct. at 1522; *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94-95 n.31 (1981) (interpretive inquiry begins with the text and structure of the statute, and ends once it has become clear that Congress did not provide a cause of action). Without the requisite congressional intent to create not just a private right but also a private remedy under FOTETA, Petitioner's claim fails. *See Alexander*, 121 S. Ct. at 1519-20. FOTETA is framed as a general mandate to the Secretary of Transportation to establish drug testing programs for transportation workers in safety-sensitive positions and develop comprehensive testing and laboratory requirements

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(Cont'd)
insofar as they assist in determining congressional intent. *See Touche Ross*, 442 U.S. at 575-76. The *Cort* factors are: (1) whether plaintiff is part of the class for whose special benefit the statute was passed; (2) whether the legislative history indicates a congressional intent to confer a private right of action; (3) whether a federal cause of action would further the underlying purpose of the legislative scheme; and (4) whether plaintiff's cause of action is a subject traditionally relegated to state law. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810-11 (1986). Petitioner has wholly failed to cite the Court to any legislative history evidencing congressional intent to create an implied private right of action under FOTETA. Petitioner merely states, without substantiation, that the "overarching goal of 49 U.S.C. § 31306 is to protect the safety of the public and to ensure adequate protection and privacy of drivers, employees, and owner/operators through drug and alcohol testing regulations and rehabilitation programs." *See* Pet., p. 10. This is insufficient. Furthermore, Petitioner cites the Court to no support for his contention that a private cause of action would further the purpose of FOTETA's legislative scheme, or how this would be relevant in light of *Alexander*. Lastly, Petitioner fails to cite the Court to any support for his contention that his cause of action is a subject traditionally relegated to state law.

for such programs. *See* 49 U.S.C. § 31306. Like the statutes found not to create a right of action in *Alexander* and *Universities Research Assn., Inc. v. Coutu*,[6] FOTETA is phrased as a general directive to a federal agency. *See* 49 U.S.C. § 31306. A statute phrased as a directive to federal agencies provides little reason to infer a private remedy in favor of individual persons. *See Alexander*, 121 S. Ct. at 1519-20; *see also Cannon v. University of Chicago*, 441 U.S. 677, 690-92 (1979) ("far less reason to infer a private remedy" if a statute was drafted merely as a prohibition against agency disbursement of public funds to institutions not complying with federal law). The language of FOTETA provides no support for the implication that Congress intended to provide Petitioner a private right of action to enforce federal drug testing regulations. Petitioner has failed to articulate a compelling reason for review.

B. Petitioner provides the Court with no support for his claims of an implied private right of action.

Petitioner makes the disingenuous contention that because transportation workers are specifically named by FOTETA, he is a member of the class of beneficiaries for whom FOTETA was enacted. *See* Pet., p. 11. As an operator of a commercial motor vehicle, Petitioner is a regulated

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6. 450 U.S. 754 (1981). In *Coutu*, the Court determined whether section one of the Davis-Bacon Act provided a private right of action to enforce its provisions. *See Coutu*, 450 U.S. at 772. Although the statute was designed to benefit a particular class, the Court found that the enactment under consideration was framed as a general prohibition or command to a federal agency. *See id.* at 771-72. The Court held that because Congress framed the section as a directive to a federal agency, the Act's language provided no support for the implication of a private remedy. *See id.* at 772-73.

worker under FOTETA. *See* 49 U.S.C. § 31306. Statutes that focus on the person regulated rather than the individuals protected, however, create "no implication of an intent to confer rights on a particular class of persons." *See Alexander*, 121 S. Ct. at 1521 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Furthermore, FOTETA's legislative history demonstrates that FOTETA was "designed to prevent needless deaths attributable to the use of drugs and alcohol by the operators of our transportation systems." 137 CONG. REC. S6133-02, S6137 (Sept. 17, 1991) (statement of Sen. Hollings).[7] FOTETA was not enacted for the benefit of commercial motor vehicle operators.

In *Alexander v. Sandoval*, the Court decided whether an implied private right of action existed to enforce federal agency regulations promulgated under authority of Title VI of the Civil Rights Act of 1964. *See Alexander*, 121 S. Ct. at 1521. The Court found that the statute under consideration in *Alexander* authorized federal agencies to effectuate the statute's provisions by issuing rules and regulations, or orders of general applicability, but was completely devoid of any "rights-creating" language on behalf of the class of persons protected. *See Alexander*, 121 S. Ct. at 1520-21. Likewise, FOTETA is a directive to the Secretary of Transportation to promulgate drug testing programs for transportation workers.

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7. The legislative findings accompanying the original passage of FOTETA remain applicable even though the provisions have since been revised. The statement of purpose accompanying the 1994 revision to FOTETA notes that its purpose is "to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III, and V-X of title 49, United States Code, and to make other technical improvements in the Code." S. REP. No. 265, 103d Cong., 2d Sess. 1 (1994).

FOTETA focuses neither on the individuals protected nor even on the individuals being regulated, but on the agencies that will do the regulating. *See* 49 U.S.C. § 31306 (1996); *see also Alexander*, 121 S. Ct. at 1521. Like the statute in *Alexander*, the focus of FOTETA is twice removed from any congressional intent to create new rights for the persons regulated by its provisions.

To the extent that Petitioner relies upon the Ninth Circuit's opinion in *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000), as support for his argument that he has an implied private right of action to enforce DOT drug testing regulations as a "specifically named beneficiary" under FOTETA, Petitioner's argument is expressly undermined by the Court's decision in *Alexander v. Sandoval*.[8] Far from displaying congressional intent to create new rights for regulated workers such as Petitioner, FOTETA focuses on those agencies effectuating a "drug testing program . . . crucial to public safety." *See* 137 CONG. REC. S6133-02, S6138 (Sept. 17, 1991) (statement of Sen. Danforth). Petitioner has failed to identify a compelling reason for granting Certiorari in this appeal.

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8. Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer* is misplaced. 224 F.3d 1117 (9th Cir. 2000). The issue in *First Pacific* was whether a federal statute gave shareholders of a bank in FDIC receivership a private right of action against the FDIC to compel it to make available to such shareholders FDIC-prepared annual reports of receivership as provided for by the text of the statute. *See First Pacific*, 224 F.3d at 1122. It is doubtful that the Ninth Circuit would concur with Petitioner's contentions regarding its holding in *First Pacific*, given the court's express recognition that general directives to federal agencies carry "no implication of an intent to confer rights on a particular class of persons." *See First Pacific*, 224 F.3d at 1122-23 (citation omitted).

C. DOT and FHWA regulations cannot create an implied private right of action.

Petitioner contends that certain provisions of DOT drug testing regulations and interpretive guidelines contain "rights-creating" language and therefore must be privately enforceable. *See* Pet., p. 19. Specifically, Petitioner relies upon a FHWA regulation that mandates transportation employees be provided information explaining drug testing, and a DOT drug testing regulation that states that transportation employees may not be required to waive negligence by others.[9] *See* Pet., p. 20. An agency regulation, however, cannot create a private right. *See Alexander v. Sandoval*, 121 S. Ct. 1522; *Touche Ross*, 442 U.S. at 577 n.18 ("[T]he language of the statute and not the rules must control"). Petitioner's argument that DOT drug testing regulations and interpretive guidelines contain "rights-creating" language and are consequently privately enforceable therefore skips an important analytical step. *See Alexander*, 121 S. Ct. at 1522.

The Court recently re-affirmed that agency regulations cannot imply the existence of a private cause of action. *See Alexander*, 121 S. Ct. at 1522. In the absence of congressional intent to provide a private right of action, no amount of "rights-creating" language in agency regulations

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9. "The employee may not be required to waive negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others." 49 C.F.R. § 40.25(f)(22)(ii) (1997). Petitioner also relies upon a DOT drug testing regulation that states that the quantification of test results may be disclosed "to the decisionmaker in a lawsuit, grievance, or other proceeding." *See* 49 C.F.R. § 40.29(g)(3) (1997).

will create one. *See id.* ("Agencies may play the sorcerer's apprentice but not the sorcerer himself.").[10] The language relied upon by Petitioner in DOT and FHWA regulations does not manifest an intent by Congress to create a private right of action to enforce federal drug testing regulations. Therefore, Petitioner has failed to identify a compelling reason for granting review in this case.

D. Petitioner's policy argument regarding his alleged lack of a remedy fails.

Petitioner misstates the law when he alleges that there are no enforcement mechanisms available to drivers aggrieved by alleged violations of the drug-testing regulations, thereby leaving individuals such as Petitioner without a remedy. *See* Pet., p. 17. An individual may make a complaint of alleged violations of the drug testing regulations to the Secretary of Transportation. The Secretary is required to investigate nonfrivolous written complaints regarding substantial violations of commercial motor carrier safety regulations. *See* 49 U.S.C. § 31143(a) (1996). The Secretary may receive evidence, issue subpoenas, and conduct hearings to determine the merits of such complaints. *See* 49 U.S.C. § 31133(a) (1996 & 2000 Supp.). If the Secretary finds

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10. Furthermore, Petitioner cannot bring a lawsuit pursuant to a federal statute for alleged violations of DOT or FHWA regulations, where the alleged violations are not specifically prohibited by the ***text*** of the statute. *See Alexander*, 121 S. Ct. at 1522 (emphasis added); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). Drug testing and collection procedures are not part of the text of FOTETA. *See* 49 U.S.C. § 31306.

a violation, the Secretary is required to inform the party in violation of DOT safety regulations what action might be taken in order to abate the violation. *See* 49 U.S.C. § 521(b)(1)(A) (2000 Supp.). The Secretary may also impose civil penalties on parties found to be in violation of DOT safety regulations, after notice and an opportunity for a hearing. *See* 49 U.S.C. § 521(b)(2) (2000 Supp.). The Secretary may also bring civil actions to enforce DOT safety regulations against commercial motor carriers. *See* 49 U.S.C. § 507(a)(2) (1996).

The FHWA's regulations reflect Congress's express provision for enforcement of motor carrier safety regulations. *See* 49 C.F.R. part 386. The FHWA provides administrative procedures and rules for proceedings

> to determine whether any motor carrier, its agent, employee or other person subject to the jurisdiction of the FHWA under [the Commercial Motor Vehicle Safety Act and the Motor Carrier Safety Act] has failed to comply with any provision or requirements of those statutes or regulations issued under them and, if such a violation is found to issue an appropriate order to compel compliance with the statute or regulation, assess a civil penalty, or both.

See 49 C.F.R. § 386.1. Petitioner had a remedy for his perceived wrongs. He could have filed a complaint with the Associate Administrator of the FHWA regarding his claims of alleged violations of drug testing regulations. *See* 49 C.F.R. § 386.12. He chose not to do so.

The DOT's comprehensive statutory enforcement mechanism is evidence of congressional intent as to who has the power to enforce DOT drug testing regulations.[11] *See Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996). Furthermore, the express provision of a comprehensive remedial scheme is some evidence that Congress intended to preclude other remedies. *See Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989) ("[W]here a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. . . . In such cases, '[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.' "). Without congressional intent to provide a private remedy, a private cause of action does not exist and courts may not create one, no matter how desirable a private remedy may be as a policy matter, or how compatible such an action may be with the purpose of the statute. *See Alexander*, 121 S. Ct. at 1520; *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica*, 444 U.S. at 23; *Touche Ross*, 442 U.S. at 575-76. Petitioner has failed to identify a reason for review by the Court.

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11. "The six operating administration rules to which part 40 [drug testing] procedures apply are part of existing ***statutory*** and regulatory systems. Generally, they will be enforced in the same way as the rest of those systems. For example, FAA and FHWA personnel inspect the equipment and records of the carriers they regulate. If they find rule violations, they may initiate enforcement proceedings and impose civil penalties. The FAA and FHWA personnel would add review of compliance with drug testing requirements to the other checks they make of employers' compliance with safety rules." *Enforcement Considerations*, 54 Fed. Reg. 49,854, 49,865 (December 1, 1989) (emphasis added).

III. *BIVENS* DOES NOT PROVIDE PETITIONER A REMEDY.

A. The Fourth Amendment is not implicated by alleged procedural violations of drug testing regulations.

Petitioner alleges that the random drug test made the basis of this lawsuit was inherently unreasonable due to violations of drug testing regulations during the collection of his urine specimen. *See* Pet., p. 23. Petitioner argues that, under *Bivens*, he is therefore entitled to recover money damages from Respondents for alleged violations of his rights under the Fourth Amendment. *See* Pet., p. 22. Petitioner has never, however, alleged that his **selection** for the random drug test made the basis of this lawsuit violated his constitutional rights. Upon *de novo* review of the record in this lawsuit, the Sixth Circuit held that even if Petitioner had been allowed to make a Fourth Amendment claim, on the facts of this lawsuit, such a claim would fail to state a claim for which relief could be granted. *See* Pet., App. B-14–B-15.

This Court has held that suspicionless drug testing of employees in safety-sensitive jobs is consonant with the Fourth Amendment where the testing is part of a systematic, uniformly applied testing program. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989). In *Skinner* and *Von Raab*, the Court concluded that the drug testing at issue was permissible without the usual protection of a warrant based on probable cause, and even without "any measure of individualized suspicion." *See Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 633. In *Skinner*, railroad employees' privacy expectations, which were limited

because of the industry's pervasive regulation, were outweighed by the government's compelling interest in ensuring the safe operation of the rails. *See Skinner*, 489 U.S. at 633. In *Von Raab*, the Court similarly found that the government's interests in safety and the integrity of its borders outweighed the individual privacy interests of customs officials who carry firearms or are involved in drug interdiction. *See Von Raab*, 489 U.S. at 668.

In both of these cases, "the circumstances justifying toxicological testing and the permissible limits of such intrusions [we]re defined narrowly and specifically" by the drug testing programs at issue. *Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 667 (citing *Skinner*, *supra*). The Court found that because "minimal discretion [was] vested in those charged with administering the program," a search warrant authorized by a neutral magistrate is less crucial than in other Fourth Amendment contexts. *Skinner*, 489 U.S. at 622; *see also Von Raab*, 489 U.S. at 667 (every employee seeking a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test). Petitioner does not contend that his selection for the drug test made the basis of this lawsuit was contrary to a systematic, uniformly applied testing program. *See* Pet., p. 28. Petitioner contends that alleged violations of DOT urine specimen collection procedures made an otherwise permissible search unreasonable under the Fourth Amendment.

In *Drake v. Delta Airlines, Inc.*, the Second Circuit examined the difference between the plaintiff's claims of alleged violations of drug testing procedures and his claim that his selection for a random drug test was not truly random. 147 F.3d 169, 171-72 (2d Cir. 1998). In analyzing the

plaintiff's claims, the Second Circuit held that the plaintiff's allegations of violations of DOT drug testing regulations failed to state a claim for which relief may be granted because FOTETA does not provide an implied private right of action. *See id.* at 170-71. In reviewing the plaintiff's complaint, however, the Second Circuit found that the plaintiff's pleadings could be construed to allege that the plaintiff's selection for the drug test made the basis of the lawsuit was not randomly administered. *See id.* at 172. The Second Circuit held that the plaintiff's allegation that he was not randomly selected for testing pursuant to a systematic, uniformly applied drug testing program was sufficient to make out a *prima facie* claim of unreasonableness under the Fourth Amendment. *See id.*

In *Drake*, the Second Circuit properly draws the distinction between: (1) an employer's impermissible exercise of discretion in requiring a transportation employee to submit to a drug test contrary to a systematic, uniformly applied random selection program, and (2) alleged violations of urine specimen collection and testing regulations after a properly random selection. *See Drake*, 147 F.3d at 171-72. An allegation of an abuse of the former is sufficient to make out a *prima facie* claim of unreasonableness under the Fourth Amendment. *See Drake*, 147 F.3d at 172; *see also Hammons v. Norfolk Southern Corp.*, 156 F.3d 701, 702 (6th Cir. 1998) (allegation that plaintiff was subjected to twenty-four random drug tests in year and a half); *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1261 (10th Cir. 1996) (officials departed from substance abuse policy and wrongfully exercised discretion in deciding plaintiff should be tested). An allegation of the latter fails to state a claim for which relief may be granted. *See Drake*, 147 F.3d at 170-71. Petitioner's claim of alleged violations of DOT regulations

does not make out a *prima facie* claim of constitutional injury. Petitioner complains only of alleged violations of DOT and FHWA drug testing regulations. Petitioner has therefore failed to identify a compelling reason for review in this case.

B. Special factors counsel hesitation in recognizing a *Bivens* cause of action in this context.

Petitioner argues that *Bivens* provides him a remedy for alleged procedural violations of DOT drug testing regulations. *See* Pet., p. 22. A *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declares it to be a substitute for recovery under the Constitution, and (2) where, in the absence of affirmative action by Congress, there are special factors that counsel hesitation. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).[12] In each instance that the Court has extended the scope of *Bivens*, as in *Bivens* itself, the Court has found that there were no "special factors counseling hesitation in the absence of affirmative action by Congress,"

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12. Negligence will not generally serve as the basis for a claim for violations of constitutional rights secured by the Fourth and Fifth Amendments. *See Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required); *see also Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (mere lack of due care by a state official cannot "deprive" an individual of life, liberty, or property under the Fourteenth Amendment); *Dodd v. City of Norwich*, 827 F.2d 1, 3 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (Fourth Amendment proscribes only unreasonable searches and seizures, not those conducted in a negligent manner). To the extent Petitioner attempts to use *Bivens* as an end-run around the absence of an implied private right of action under FOTETA, his contentions should be summarily dismissed.

no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy. *See Davis v. Passman*, 442 U.S. 228, 246-47 (1979); *Carlson*, 446 U.S. at 18-20. The concept of special factors counseling hesitation in the absence of affirmative action by Congress includes "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). In recent decisions, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (citing *Schweiker*, 487 U.S. at 421).[13]

"When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, the Court has declined to create additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.[14] In this case, there is more than a suggestion

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13. The absence of statutory relief for a constitutional violation does not, by itself, give rise to an implied damage remedy. *See Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988); *see also Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983) (no implied damage remedy available even in the absence of a meaningful statutory remedy).

14. In *Bush v. Lucas*, the Court refused to create a *Bivens* action even though it assumed a First Amendment violation with relation to an adverse employment action and acknowledged "existing remedies do not provide complete relief for the plaintiff." *See Bush v. Lucas*, 462 U.S. 367, 388 (1983). In *Schweiker v. Chilicky*, the Court again refused to create a *Bivens* action for alleged due process violations in the denial of Social Security disability benefits. *See Schweiker*, 487 U.S. at 429. In refusing to extend *Bivens*

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in the "design" of the DOT drug testing program that Congress provided what it considered adequate remedial mechanisms for violations that may occur in the course of the administration of those programs. Congress created a comprehensive statutory enforcement scheme designed to ensure compliance and to redress violations of those regulations created by the DOT. *See* discussion, *supra*. The safeguards provided by Congress in promulgating FOTETA "include a requirement that testing follow Department of Health and Human Services guidelines; that initial screening tests be followed up by confirmatory tests by laboratories that meet rigorous certification standards, and that the confidentiality of the results and medical histories be protected." 137 CONG. REC. S13170-02, S13172 (Sept. 17, 1991) (statement of Sen. Hollings). The legislative history of FOTETA therefore establishes that Congress considered the adequacy of the safeguards built in to the DHHS certification process and federal workplace drug testing procedures, and judged the regulatory enforcement authority of the DOT operating administrations sufficient to prevent and, when necessary, remedy violations of employee's rights under the DOT drug testing program. Petitioner asks the Court to extend a *Bivens* remedy into this heavily regulated realm of commercial transportation. The Court should decline Petitioner's invitation "to create a new substantive legal liability without legislative aid because . . . Congress is in a better position to decide whether or not the public interest would be served by creating it." *See Bush v. Lucas*, 462 U.S. 367, 390 (1983) (citation omitted).

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remedies in *Schweiker* and *Bush*, the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. *See Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 388.

C. Petitioner fails to state a claim for a violation of his constitutional rights.

1. *Petitioner's random drug test did not violate Petitioner's constitutional rights.*

Petitioner's allegation of "various procedural problems" during the collection of his urine specimen does not implicate his rights under the Fourth Amendment. *See* Pet., p. 23.[15] This Court has acknowledged the vital governmental interest in ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment such as Petitioner. *See Skinner*, 489 U.S. at 628. "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624; *see also Von Raab*, 489 U.S. at 665-66. The drug testing regulations codified at 49 C.F.R. part 40 were considered by this Court in *Von Raab* to the extent they supplemented or displaced the Commissioner of Customs' directive. *See Von Raab*, 489 U.S. 661 n.1. To the extent these regulations were not considered by this Court in *Von Raab*, the drug testing regulations codified at

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15. One of Petitioner's complaints regarding the collection of his random urine specimen is that there was an alleged "time delay in taking [the] temperature" of the urine specimen. *See* Pet., p. 23. Although there is no evidence to support this assertion, any delay in measuring the temperature of Petitioner's urine specimen would have resulted in a ***lower*** temperature. As it was, the urine specimen provided by Petitioner was measured as being 6.4° F higher than his body temperature at the time the specimen was submitted, which is a reasonable basis to suspect that Petitioner's urine specimen had been adulterated.

49 C.F.R. part 40, and in force as of 1997, closely track the regulations sanctioned by this Court in that case. *See* 489 U.S. at 672-73 n.2. Petitioner alleges only procedural violations of those urine specimen collection regulations.[16]

In an effort to make a colorable claim under the Fourth Amendment, Petitioner relies heavily upon the Arkansas Supreme Court's decision in *Stueart v. Arkansas Police Comm'n*.[17] *See* Pet., p. 25. *Stueart* involved a state employee's challenge of the state police commission's decision to affirm his termination for testing positive for a controlled substance. *See Stueart*, 945 S.W.2d at 378. In *Stueart*, the Arkansas Supreme Court reviewed that commission's decision and found that the commission's decision was based upon administrative findings that were not made in accordance with required agency procedure. *See id.* The Arkansas Supreme Court overturned the commission's decision because the commission ignored its own rules in upholding the plaintiff's termination. *See id.* at 379. *Stueart* merely reiterates an Arkansas rule of law that a decision of a state administrative agency will be overturned if the substantial rights of an administrative petitioner are prejudiced by administrative findings made upon unlawful procedure. *See id.* at 380.[18]

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16. One of Petitioner's perceived procedural violations of the regulations was the use of an "ear thermometer" to measure the temperature of his urine specimen. *See* Pet., p. 23. Petitioner's complaint regarding the *method* of temperature measurement is irrelevant. Both of the courts below found that Petitioner's urine specimen was accurately measured as 104.6° F.

17. 945 S.W.2d 377 (Ark. 1997).

18. The *Stueart* court expressly found that numerous procedural violations in the collection of the urine specimen at issue did not

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The *Stueart* court did not hold that a violation of Arkansas drug testing regulations constituted a violation of the plaintiff's Fourth Amendment rights. *See id.* The *Stueart* opinion is inapposite to Petitioner's factual and legal allegations in this lawsuit. Petitioner was disqualified for failing to submit a second urine specimen after the temperature of his random urine specimen was measured as being outside the range of 90°-100° F. Petitioner presents the Court with no support for his contention that alleged violations of DOT drug testing regulations violated his constitutional rights and has therefore failed to identify any reason for review in this case.

2. *The collection of the second urine specimen was constitutionally permissible.*

Petitioner contends that the requirement that he submit a second urine specimen was based upon non-existent regulations and was therefore unreasonable. *See* Pet., p. 28.[19]

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affect the reliability of the drug test where the procedural violations were cured by subsequent testimony. *See Stueart*, 945 S.W.2d at 379. Similarly, in this lawsuit, the collection site attendant testified that she initially made an error regarding the temperature of Petitioner's random urine specimen and further testified as to the steps she took to correct and document the error. *See* Pet., pp. 3-4.

19. Med Express does not read Petitioner's argument as a facial challenge to individualized "reasonable suspicion" drug testing. FOTETA does, however, provide for drug testing upon individual suspicion of drug use. *See* 49 U.S.C. § 31306(b). If Petitioner is making a facial challenge to drug testing based upon individualized suspicion, such testing of transportation employees in safety-sensitive positions is consonant with the Fourth Amendment. *See Skinner*, 489 U.S. at 624 (drug test reasonable absent individual suspicion).

Petitioner, however, ignores the record in both courts below that established Petitioner's urine specimen was measured as having a temperature of 104.6° F. *See* Pet., App. B-5; Pet., App. E-7. DOT drug testing regulations require that when there is reason to believe a specimen has been adulterated, a second observed specimen "***shall*** be obtained as soon as possible." *See* 49 C.F.R. § 40.25(f)(16) (1997) (emphasis added). A urine specimen temperature outside the range of 32°-38° C/90°-100° F constitutes reason to believe that a specimen donor has altered or substituted the specimen. *See* 49 C.F.R. § 40.25(f)(13) (1997). Having reason to believe the specimen was adulterated, the collection site attendant informed Petitioner that he would be required to provide a second, observed urine specimen and that Petitioner was not to leave the clinic. Petitioner left the clinic without providing a second urine specimen. Petitioner was disqualified as a DOT truck driver for failing to provide a second urine specimen.

Drug testing of transportation workers in safety-sensitive positions is consonant with the Fourth Amendment when there is individualized "reasonable suspicion" of a violation of the prohibition against controlled substances. *See Skinner*, 489 U.S. at 624 (drug test reasonable absent individual suspicion); *see also Drake*, 147 F.3d at 172; *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996); *Ford v. Dowd*, 931 F.2d 1286, 1290-92 (8th Cir. 1991); *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 (3d Cir. 1989). Petitioner submitted a urine specimen with a temperature of 104.6° F. *See* Pet., p. 3. Petitioner's body temperature at the time he submitted his random urine specimen was measured as 98.2° F. *See* Pet., p. 3. Based upon these facts, there was a reasonable basis for an individualized suspicion that Petitioner violated FHWA drug testing regulations.

The FHWA's compelling public safety and security interest did not dissipate after Petitioner's submission of his random urine specimen. *See Skinner*, 489 U.S. at 628 (such employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" and make judgments that "can cause great human loss before any signs of impairment become noticeable to supervisors or others"). Petitioner therefore suffered no constitutional injury when he was required to submit a second urine specimen based upon individualized suspicion of adulteration after he provided a urine specimen that was more than **six degrees hotter** than his own body temperature. *See* Pet., p. 3. Petitioner has failed to identify any basis for review in this case.

CONCLUSION

Each United States court of appeals to decide whether an implied private right of action exists to enforce federal drug testing regulations has held that no such cause of action exists. The district court's decision to deny Petitioner leave to amend his pleadings after entry of judgment against him is not a reason for the Court to review this case. Petitioner's requested review of factual determinations by the courts below is also not a reason for the Court to review this case. Lastly, the limited implied constitutional tort recognized by this Court in *Bivens* does not provide Petitioner a remedy for alleged violations of federal urine collection and testing regulations. The issues presented in the petition for writ of certiorari do not raise issues of great public importance or national interest such that this Court should devote its limited time and resources to a review.

Med Express respectfully requests this Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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